

Forestwood Farms, Inc. and United Food and Commercial Workers Union Local 1657, AFL-CIO.
Case 10-CA-25545

September 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On April 28, 1992, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Forestwood Farms, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent asserts that some of the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that such contentions are without merit.

² In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee Carmichael, we do not rely on the judge's finding that the Respondent's attorney suggested that the Union find Carmichael another job. The record is unclear as to who suggested that the Union find Carmichael another job. However, even without relying on this finding, we agree with the judge's conclusion that the General Counsel established a *prima facie* case.

Chairman Stephens, in agreeing with the judge that the Respondent failed to rebut the General Counsel's *prima facie* case, finds it unnecessary to rely on *Paradise Post*, 297 NLRB 876 (1990), a case in which he dissented.

The judge's decision contains the following errors which do not affect the result. In secs. E and F of his decision, the judge refers to certain events as occurring in 1992 rather than 1991. Additionally, the judge indicated that the Union's witness, Seidenfaden, testified that when the Union filed its petition for certification, the Respondent's president, Scott, called him and told him, "My people don't want a union." The judge further stated that "Scott agreed that he called Seidenfaden, thus corroborating the Union representative." The Respondent excepted to the judge's implication that Scott admitted he said, "My people don't want a union." A review of the record shows that Scott only testified to the fact that he called the union representative, and did not admit that he told Seidenfaden that the Respondent's employees did not want a union.

Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Gaye Nell Hymon, Esq., for the General Counsel.

David Arendall, Esq. (Arendall & O'Kelley), of Birmingham, Alabama, for the Respondent.

George Longshore, Esq., of Birmingham, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on September 16, 1991, by United Food and Commercial Workers Local 1657 (the Union). Complaint issued on October 18, 1991, and alleges that Forestwood Farms, Inc. (Respondent or the Company), on October 28, 1991, discharged employee Cassandra Carmichael because of her membership in and activities on behalf of the Union, thus violating Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

A hearing was held before me on this matter in Birmingham, Alabama, on January 24, 1992. Thereafter, the General Counsel and Respondent filed briefs. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish that Respondent is an Alabama corporation, with an office and place of business located at Birmingham, Alabama, where it is engaged in the processing of vegetables into cut products. During the calendar year preceding issuance of the complaint, a representative period, Respondent purchased and received at its Birmingham, Alabama facility, goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Alabama. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The pleadings as amended at the hearing establish that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Union's Campaign and Certification

The Union began an organizing campaign in February 1990. The leading union proponent was Cassandra Carmichael, who obtained signatures on 19 union authorization cards. Company President Everett W. Scott Sr. denied knowing this until the day of the hearing. However, Carmichael testified without contradiction that Scott called her a "troublemaker" on several occasions, and that he had never applied this term to her before the beginning of the union campaign. She also testified without contradiction that Scott told a supervisor to handle her with kid gloves because she was reporting back to the Union. I credit her testimony.

The Union made a written demand for recognition, and George Seidenfaden, the Union's secretary/treasurer, testified that Scott called him and asked the meaning of the letter. Seidenfaden explained it, and Scott replied that his "people don't want a union." Seidenfaden answered that the Union's position was based on signed authorization cards. Scott agreed that he called Seidenfaden, thus corroborating the union representative. A representation petition was filed on May 11, 1990,¹ and a Board election was held, at which Carmichael participated as a union observer. On July 2, 1990, the Union was certified as the representative of Respondent's food preparers and processors, with certain exclusions.²

B. The Bargaining, the Contract, the Company's Objections to Carmichael, and the Decertification

1. Summary of the evidence

Bargaining began in November 1990, and Company Owner Scott attended the first two sessions, together with Attorney Arendall. The Union was represented by union official Seidenfaden and by Carmichael. The latter was the only employee representative of the Union, and attended most of the bargaining sessions. In the second session, according to Seidenfaden, Scott began criticizing Carmichael, and this led to a dispute between Seidenfaden and Scott. Thereafter, the Company was represented only by Attorney Arendall.

Seidenfaden testified to a number of conversations with Arendall in which Carmichael was discussed. Thus, in late January 1991, after a negotiation session in Arendall's conference room, Arendall inquired as to the identity of the individual the Union intended to appoint as shop steward. Seidenfaden named Carmichael, and Arendall said that this was a mistake. When Seidenfaden asked the reason, Arendall replied that there was a "lot of animosity" between Scott and Carmichael because of "all this mess." When Seidenfaden asked Arendall to explain what he meant, the latter referred to "the last several months with your Union." Arendall said that the Union could get a better contract if it agreed not to designate Carmichael as steward. The Company stated that she talked too much, and would abuse the position of steward. Seidenfaden replied that the Union would remove Carmichael as steward if she did not perform her job, but otherwise rejected the Company's proposal.

Seidenfaden further affirmed that he had a telephone conversation with Arendall in February 1991, in which the attorney told him that Scott was "considerably upset" over the Union's intention to designate Carmichael as steward. Arendall suggested that the Union get her another job at a company where the Union had a contract, and Seidenfaden rejected this proposal.

The parties reached an agreement in February 1991. However, according to Seidenfaden, the Company withdrew its position on prior tentative agreements, principally one which specified a 3-year duration to the contract. The Company reduced this term so that the agreement ran for only a few months. Seidenfaden testified that Arendall told him that some of the things he had agreed to were "taken off the table" because of the Union's failure to address the issue of Carmichael as the steward. The Company wanted "peace

and harmony," and could not be assured of that with Carmichael as the steward. Further, Seidenfaden averred, Arendall informed him that the Company intended to file a decertification petition.

Attorney Arendall testified, and partially corroborated and partially denied Seidenfaden's testimony. He agreed that the subject of Carmichael's "talking" had come up in an early bargaining session, and that the Company expressed concern that Carmichael would "abuse" the shop steward position by going to various work areas and interfering with production. Arendall also agreed that on "at least one occasion, if not two," he discussed Carmichael with Seidenfaden. The Company was worried about the Union's right to designate stewards under the proposed clause.³ Arendall felt that the Company and the Union "would be at odds with each other over whether she [Carmichael] was doing Union duties or was goofing off from her work." However, Arendall denied that he ever told the Union not to appoint Carmichael—the Company's concern was with the Union's power to designate stewards under the proposed clause. Arendall asserted that it was "given" that Carmichael would be the steward. He confirmed Seidenfaden's testimony that the latter promised to remove Carmichael in 2 months if she did not work out. Asked why Seidenfaden would have said this if the Company had not expressed disagreement with her appointment, Arendall replied that the Company's concern was with the steward clause.⁴

Arendall did not specifically deny that he told Seidenfaden that there was a lot of animosity between Scott and Carmichael because of "this mess." Nor did he specifically deny suggesting that the Union get Carmichael another job. According to Arendall, the issue of finding another job for Carmichael was raised by Seidenfaden, as something he would have to do if he removed Carmichael as steward. Arendall denied that there had been a tentative agreement on a 3-year term for the contract. Nonetheless, he asserted that there had been a "change" to "the short contract." The reason for this was the fact that an employee had approached Scott and had asked how to get the Union "out." This was the reason for the "change," not company opposition to Carmichael as a union steward.

On February 25, 1991, the parties executed a collective-bargaining agreement which ran from February 22, to July 2, 1991.⁵ The latter date was the anniversary date of the certification. On February 25, 1991, the Union notified the Company by letter that Carmichael was designated as one of the shop stewards.⁶ On May 1, 1991, a decertification petition was filed, and the Union thereafter filed a disclaimer of interest and requested withdrawal of its original petition. On July 30, 1991, the Regional Director for Region 10 revoked the certification.⁷

³ G.C. Exh. 3, art. XVI. The Union could appoint two stewards.

⁴ The contract provided that "[t]he shop stewards shall not use their position as shop steward as an excuse to avoid performing their duties to the Employer." Id.

⁵ G.C. Exh. 3.

⁶ G.C. Exh. 4.

⁷ G.C. Exh. 5.

¹ C.P. Exh. 1.

² G.C. Exh. 2.

2. Factual analysis

Attorney Arendall's position that the Company did not express opposition to Carmichael's appointment as steward, but merely to the language of the steward clause in the contract, is disingenuous. The clause was a standard one giving the Union the right to appoint stewards. There is no reason for the Company's opposition to this clause unless it objected to one of the stewards being appointed. I credit Seidenfaden, and find that Arendall told him that there was a lot of animosity between Scott and Carmichael because of "this mess," which was defined as the Company's experience with the Union. I also find, crediting Seidenfaden, that Arendall told him the Union could get a better contract if it agreed not to appoint Carmichael as steward, and suggested that the Union get her another job with a different company.

Although Arendall denied that there had ever been tentative agreement on a 3-year term for the contract, he admitted that there had been a "change" to a "short term contract." I infer that there had been tentative agreement on a longer contract, otherwise there would have been nothing to "change." Although Arendall asserted that the reason for the change was an employee's inquiry to Scott on how to get the Union out, and, in fact, a decertification petition was filed, this did not take place until May 1, 1991, several months subsequent to Arendall's and Seidenfaden's discussions about a contract. Without making a finding on Arendall's hearsay as to what an employee may have told Scott about decertification, I credit Seidenfaden's testimony that Arendall told him, at about the time of signing the agreement, that some things had been "taken off the table" because the Company wanted "peace and harmony," and was not assured of having it with Carmichael as a union steward. One of the matters taken off the table was a 3-year term for the agreement.

C. Carmichael's Employment History Until April 1991

Carmichael started working for the Company as a vegetable processor in July 1989. Her supervisor was Donald Shipp. He testified that Carmichael needed "real close supervision." Company Owner Scott contended that Carmichael was a marginal employee from the beginning. Her shortcoming was talking, and her habit of ceasing to work while doing so.

Scott contended that he talked to Carmichael about this problem, and the Company produced records entitled "Employee Warning Report." However, most of these record absence or tardiness. Scott averred that they are merely used for record keeping on attendance, and do not constitute disciplinary records. The first one is dated February 15, 1990, about the time of the beginning of the union campaign, and states that Carmichael could not work because of sickness in the family.⁸ Scott testified that it was company policy to "write up" every time an employee was absent, and agreed that it was probable that Carmichael had been absent previously during the 7 or 8 months that she had then been employed. However, he could not explain why there were no writeups recording such prior absences.

There are five more such reports in 1990, and several more of similar nature in 1991.⁹ The first report of a dif-

ferent nature is dated November 26, 1990, at about the time the Company and the Union started bargaining. It states that Carmichael left the building without clocking out.¹⁰

The next such report is a written statement from Supervisor Shipp dated December 6, 1990, stating that he saw Carmichael in a cooler with "C.J." He asked her what she was doing there, and received no response.¹¹ Supervisor Shipp submitted a written report of Carmichael's "insubordinate behavior" on January 22, 1991.¹²

Scott agreed that there were more typewritten statements in Carmichael's file than there were in other employee files. He stated that he did not take any disciplinary action on these statements. Asked then why they were filed, Scott said that he had a faulty memory.

D. Carmichael's Grievances

1. Summary of the evidence

On April 6, 1991, Carmichael filed a grievance alleging that she had been told to go home early, and requested compensation for lost time.¹³ Carmichael was the only employee who filed a grievance. Elaise Fox, a union business agent, testified that the Company granted this request.

On June 6, Carmichael received a warning report alleging that she had thrown a knife into a box of onions and had opened up an air valve.¹⁴

On the next day, June 7, 1991, Carmichael filed a grievance alleging that Scott was harassing and intimidating her because she was the shop steward, and was attempting to get

¹⁰ Id. Carmichael stated that she left the building to mail a letter while on a break. Although there is no evidence that she exceeded her break period, one of Scott's sons told her when she returned that she had left the property on company time, because the Company was responsible for her unless she clocked out.

¹¹ Id. Carmichael affirmed that C.J. was a truckdriver, and that when the truckdrivers pull the lettuce out of the cooler, employees go in to see how much is there. According to Carmichael, Scott came over to her work area, "insulted" her in front of her coworkers, and said that he would fire her if he caught her in the cooler again with C.J. Scott testified about this, and asserted that Carmichael had no authority to be in the cooler checking on lettuce. Although Shipp's statement was placed in Carmichael's file, Scott did not give her an opportunity to submit a written statement.

¹² Id. Shipp's statement alleges that Carmichael was talking with a loud voice, that he ordered her to lower it, and that she replied she was not the only one talking. When Shipp said that she was the only one talking in a loud voice, Carmichael began screaming. She later began to "settle down" and resume her work. Respondent submitted a written statement from employee Randy Scott corroborating Shipp. Carmichael testified that she was not the only one laughing and talking. Everett Scott testified that Carmichael was not given a copy of Randy Scott's statement, and was not given an opportunity to present her side of the story. As explanation, Scott said that he took no disciplinary action. Asked why he then placed the two written reports in Carmichael's file, Scott replied, "Just for recordwise."

¹³ G.C. Exh. 6.

¹⁴ R. Exh. 2. Scott asserted that he was called to Carmichael's work area because she was not working properly, that she was upset, and that she threw a knife at somebody which went into a cardboard box. Carmichael retrieved it, and then turned the air pressure on, which "blew" everybody away. Carmichael contended that the knife fell into the box, that Scott pushed the box "on" her, and that she became so nervous that the air hose was cut accidentally.

⁸ R. Exh. 2.

⁹ Id.

her to quit her job.¹⁵ Business agent Fox made a telephone call to Scott in which she requested a meeting on the subject of Carmichael. Fox wrote Scott two letters on this matter on June 12,¹⁶ and a meeting was held on June 17. Fox, Carmichael, Scott and an individual named "Ron" were present.

According to Fox, the meeting lasted for "awhile." Scott and Carmichael traded accusations. Scott said that Carmichael started out as "such a good employee," but "after this mess" was "one of the worst." He wished that Carmichael would go somewhere else and find another job. Carmichael said that her work had not changed, but that her attitude toward Scott had changed because his attitude toward her had changed. Scott repeated that Carmichael had become "one of the worst women in this plant." Fox asked whether Carmichael had any writeups, and Scott said that she had none. The meeting ended with Scott agreeing not to "harass" Carmichael any more. Carmichael then left, and a separate conversation ensued between Scott and Fox. Scott said he had no problems working with Fox, but that Carmichael had become one of the worst employees.

Scott denied telling Fox that Carmichael was the worst employee he ever had—she was only marginal. He denied telling Fox that there were no writeups in Carmichael's file, and commented that in fact there were such writeups. Scott was asked whether he told Fox that he had no problems with Carmichael "until this mess started, or words to that effect." He answered: "I have never used the word 'mess.'"

2. Factual analysis

Scott's answer was evasive on whether he told Fox that he had no problems with Carmichael until the mess started. Fox was a more truthful witness, and I credit her testimony on this point. Because of Fox's greater credibility, I also accept her testimony that Scott told her that Carmichael had started out as "such a good employee," but had become one of the worst after "all this mess," and that Scott wished she would find a job elsewhere.

Scott was correct in asserting that Carmichael in fact did have writeups in her file at the time of Fox's inquiry about the matter. However, this is not determinative of the issue as to whether he told Fox that there were no such write ups. If he had agreed that there were and Fox had asked to see them, they may not have survived the Union's scrutiny. Further, Scott contended that they were not disciplinary in nature. Because Fox was a more truthful witness, I credit her on this issue.

At about the beginning of July 1991, Carmichael told Scott that she was quitting. Scott did not encourage her to do so, and Carmichael in fact did not resign.

E. Carmichael's Discharge

1. The rule on signing timecards

The Company predicates Carmichael's discharge on her asserted refusal to sign her timecard. Scott testified that the Company required such signatures in order to avoid disputes over the amount of time worked. The Company's 2-week pay period ended on Tuesday, and the employees were required to sign their cards on Tuesday afternoon so that the

hours worked could be reported to a payroll company the following morning. Checks were distributed on Friday. The policy on employee signing of the timecards had been in effect since at least August 1990.

There were, however, occasions on which employees had not signed by Tuesday afternoon. According to Scott, there are one or two of these every payroll period. His procedure is to take the timecards to his "downstairs" office, and ask the employees to come there and sign. Carmichael testified without contradiction that Scott on occasion permitted employees to sign their timecards on Friday, before receiving their paychecks. I credit her testimony.

2. The events of August 27, 1992

a. Summary of the evidence

Carmichael testified that Scott approached employees in the break area on August 27, 1991, a Tuesday, and said that any employee having problems with signing timecards should see him after work. Candy B. Headley, a witness called by Respondent, corroborated Carmichael. The latter obtained Supervisor Shipp's permission to discuss the matter with Scott after the break on August 27. According to Carmichael, she told the company president that she was opposed to the rule, because she did not have to sign her timecard when she started working for the company, and the rule was imposed only after another employee filed for unemployment compensation benefits. Scott replied that it was his building, that he could change the rules if he wanted to, and that he would fire Carmichael if she did not sign her timecard. Carmichael replied that she was going to sign, and that she had been doing so. She was not asked to sign her card at that time.

Carmichael contended that she asked Scott for permission to leave early because she had to take her grandmother to the doctor, and that Scott granted this request. At 10:30 a.m., one of Scott's sons, Everett (Scott), told Carmichael that a neighbor had called and reported a prowler around her house. Everett told her that she could leave, and she did so. She forgot to sign her timecard.

Scott's version is that he approached the work area at about 9 a.m., and that Carmichael asked for permission to leave by 12 noon or 12:30 p.m. Scott granted this request. He then asked her to sign her card because she had failed to sign it timely during the two prior pay periods. Carmichael replied that she did not have to sign it. About an hour later, at 10 a.m., Carmichael came to his office and again requested permission to leave early. Scott assertedly replied that he had already granted this request. He again asked Carmichael to sign the timecard, and she replied that she did not have to. Scott took no action because "at that point the time hadn't passed that we had to pick up the cards." According to Scott, Carmichael had clocked out for the lunch period, returned, and was told that somebody was breaking into her house. She had not clocked in, but left again—without permission, according to Scott.

b. Factual analysis

Carmichael's testimony is more probable than Scott's. The record contains no reason why Carmichael, after signing timecards since the inception of the rule, would suddenly have refused to do so. It is unlikely that, after receiving per-

¹⁵ G.C. Exh. 7.

¹⁶ G.C. Exhs. 9, 10.

mission at 9 a.m. to leave early, she would have announced to Scott that she was not going to sign her timecard—and then would have repeated the same request and the same refusal an hour later. It is undisputed that these events took place on Tuesday morning, prior to expiration of the timecard signing deadline under its most rigid application. Because of the improbabilities in Scott's testimony, the fact that he admitted having a faulty memory, and the fact that Carmichael appeared to be a more truthful witness, I credit her version of the events on August 27.

3. Carmichael's discharge on August 28, 1991

a. *Summary of the evidence*

The events leading to Carmichael's discharge on August 28 are the subject of conflicting accounts of four witnesses. According to Carmichael, she arrived at the plant at the starting time of 5:30 a.m. The first break, 10 minutes in duration, was scheduled for 8:30 a.m. Prior to that time, Supervisor Shipp approached her and asked her to sign her timecard. According to established practice, this meant going to Scott's "downstairs" office. Carmichael replied to Shipp that she was not feeling well, and was "taking a break." Shipp walked away, and returned. He told Carmichael to take her break, and that she could "sign it afterwards." Shipp said that he would let another employee (Pamela Collins) go first to sign her own timecard.

Carmichael then went to the break area, which was not enclosed, and sat down. About 5 minutes into the break, Shipp approached her and again asked her to sign her timecard. Carmichael replied that she was not feeling well. Shipp then went in the direction of the office. Before he arrived there, Scott approached the break area, but did not reach it. He started shouting at Carmichael, and asked whether she was "on the clock." When Carmichael replied affirmatively, Scott told her that she was fired for insubordination. He never asked her to sign her timecard.

Shipp testified about these events, but erroneously placed them the day before, on August 27. He later corrected this testimony and stated that the events took place on August 28. Shipp stated that Scott told him to bring Carmichael and Pamela Collins to the office to sign their timecards. Shipp then spoke to Carmichael and Collins "at break time." He denied that Carmichael told him that she was not feeling well, and contended that she said she would not sign "at that time." Shipp took Collins to the office to sign her own timecard.

Shipp testified that he approached Carmichael in the break area at a table, and asked her three times to sign her timecard. She replied to the first request that she was not going to sign, and did not answer the other two requests.

Candy B. Headley, an employee called by Respondent as a witness, was in the break area with 10–12 employees during these events. She testified about a conversation between Carmichael and a management representative. However, unlike Supervisor Shipp, Headley testified that the management representative was Company President Scott, rather than Shipp. Headley stated that she did not see Shipp talking to Headley; Scott asked Carmichael three times to come to his office and sign her timecard, or she would be terminated. On each occasion, Carmichael replied that she would do so on company time, not on her own time. She was "hollering"

by the end of the conversation. As employees were getting up from the break area, Scott told Carmichael that she was fired. According to Headley, employees are permitted to wait until the end of a break period before signing their timecards.

Scott testified that Shipp reported to him that Carmichael refused to come to the office and sign her timecard. After another asserted request brought the same result, Scott went to the break area and asked Carmichael to sign the timecard in his office. On direct examination, Scott testified that Carmichael replied, "I ain't going to sign." Another request brought another refusal, and Scott then asked whether she was on the timeclock. He did not get an answer, and then said that if she did not come to the office to discuss the matter, he would terminate her. After receiving no response, Scott terminated her, and told her to clock out. On cross-examination, Scott's attention was directed to Headley's testimony about Carmichael's responses, i.e., that she would sign the card on company time, not on her own time. Scott's answer was not responsive to this question. Asked the same question again, Scott replied that Carmichael "could have said that later because she was really beside herself."

Scott testified that the Company paid for breaktime, and that it was really company time. Sometime employees are required to work through breaks. He gave as examples an order that had to be filled, or a truck waiting to get out. Asked whether employees are required to sign their timecards during breaks on a "regular basis," Scott replied, "Occasionally, yes." The company president averred that employees required to work during breaks are given assurances that they will get the "lost" time back. Scott agreed that Carmichael did not receive any such assurances on this occasion.

Scott testified that Carmichael was discharged for insubordination¹⁷ which took place in front of other employees. He was asked about Carmichael's alleged insubordination on January 22, 1991, which also took place before other employees, but distinguished this on the ground that Carmichael on that occasion returned to work. The company president testified that Carmichael's prior infractions had nothing to do with her discharge—it was based entirely on the incidents of August 28, 1991.

b. *Factual analysis*

It is clear that, just before the 8:30 a.m. break on August 28, Supervisor Shipp asked Carmichael and Collins to go to the office to sign their timecards. Although Shipp denied that Carmichael told him she was not feeling well, he admitted that she said she would not sign "at that time." In addition, Shipp took Collins along to the office to get her timecard signed. I credit Carmichael's testimony that Shipp told her she could sign her timecard "afterwards," i.e., after the break.

The biggest conflict in the evidence is the identity of the management representative who repeatedly asked Carmichael in the break area to come to the office to sign her timecard. Headley, a witness for Respondent, was a truthful witness with good recall of the events. I credit her testimony, cor-

¹⁷ Scott listed other instances where insubordination had resulted in discharge—an employee threatened to "whip" Supervisor Shipp; an employee refused to move her parked car which prevented a truck from being loaded; and an employee chanted and refused to work.

roborated by Scott, that it was the company president who did so.¹⁸

I also credit Headley's testimony that Carmichael replied that she would sign the timecard on company time, rather than her own time. Scott tacitly admitted this—his explanation that Carmichael may have said this "later" is not persuasive—there is no evidence of a "later" conversation between them. I also credit Headley's testimony that employees were not required to sign timecards during breaks. Scott's assertion that they were required to do so "occasionally" on a "regular" basis is contradictory, and the examples he gave of employees being required to work through breaks had a direct impact on company operations, unlike the signing of a timecard. Finally, I note Scott's admission that Carmichael on this occasion, was not given the customary assurance that she would receive compensatory time for the lost breaktime.

F. Legal Analysis and Conclusions

The General Counsel has the burden of establishing a prima facie case sufficient to support an inference that protected conduct was a motivating factor in Respondent's discharge of Carmichael. Once this is established, the burden shifts to Respondent to demonstrate that the discharge would have taken place even in the absence of the protected conduct.¹⁹

Carmichael was the leading proponent of the Union, and the only employee on the negotiating committee. Respondent called her a "troublemaker" who was reporting to the Union. Respondent's representative told the Union that there was animosity between Carmichael and the company president because of "all this mess," which was identified as the Company's experiences with the Union. The company representative expressed opposition to Carmichael's appointment as a steward, and tried to get the Union to find her a job elsewhere. Because the Union refused to assure the Company that it would not appoint Carmichael as a steward, the Company changed its position, adversely to the Union, on elements of the contract to which it had tentatively agreed.

Respondent began inserting "warning reports" into Carmichael file at about the time the union campaign started. These principally concerned absences, and the Company was unable to explain why prior absences, which had probably occurred, were not recorded prior to the advent of the union campaign. The only explanation for warning reports issued in the absence of disciplinary action was recordkeeping. After the bargaining began, Respondent issued warning reports to Carmichael without giving her an equal opportunity to give her version of the incident in question. She had more typed reports in her file than any other employee. The timing of these actions and their disparate nature constitute evidence of discriminatory motivation. The company president told a union representative that, although Carmichael had stated out

as a good employee, she had become one of the worse "after this mess," i.e., the advent of the union campaign.

The General Counsel has thus established a strong prima facie that Carmichael's union activities were a motivating factor in Respondent's discharge of her. The fact that Respondent did not encourage Carmichael to resign when she stated this intention in July 1992 is insufficient to negate the prima facie case.

Respondent had not rebutted this case. Although it predicated its discharge of Carmichael on the ground that she refused to sign her timecard, the facts show that a company supervisor gave her permission to take a break before signing. During the break, she was asked by the company president to sign the card, and replied that she would do so on company time, not her own time. This did not constitute a refusal to sign the card, but, rather, an assertion that she would do so on the Company's time. Employees were not normally required to sign timecards during breaks. Although employees were sometimes required to work during breaks, these concerned essential company operations—the Company has not established a similar need for the signing of timecards during a break. Finally, Carmichael was not given the customary assurance that her lost break time would be restored.

Respondent's rebuttal thus fails because Carmichael did not in fact commit the alleged offense of insubordination. *Maremont Corp.*, 294 NLRB 11, 20, 42 (1989). I conclude that Respondent seized upon this incident to discharge the principal union activist. *Paradise Post*, 297 NLRB 876 (1990). In doing so, it violated Section 8(a)(3) and (1) of the Act.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Forestwood Farms, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Food and Commercial Workers Union, Local 1657, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Cassandra Carmichael on August 28, 1991, because of her union activities and sympathies, and other protected, concerted activities.
4. The unfair labor practices described in paragraph 3 constitutes an unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that Respondent unlawfully discharged Cassandra Carmichael on August 28, 1991, it is recommended that Respondent be ordered to offer her immediate and full reinstatement to her former position, or, if that position no longer exists, to a substantially equivalent position, dismissing if necessary any employee hired to fill said position, and to make her whole for any loss of earnings she may have suffered by reason of Respondent's unlawful conduct, by paying her a sum of money equal to the amount she

¹⁸This does not invalidate Carmichael's testimony that Shipp also asked her to sign, since Headley merely testified that she did not see Shipp. The latter was a confused witness, and I do not credit his assertion, implicitly contradicted by Scott, that it was Shipp who made these requests. Although Carmichael stated that Scott never reached the break area, the area was not enclosed, and the boundaries may have been indistinct.

¹⁹*Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

would have earned from the date of her unlawful discharge to the date of an offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²⁰

It is also recommended that Respondent be ordered to post appropriate notices, to remove from its personnel records all references to its unlawful discharge of Cassandra Carmichael, and to notify her in writing that such expunction has been made and that evidence of her unlawful discipline will not be used as a basis for future personnel actions against her.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²¹

ORDER

The Respondent, Forestwood Farms, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in United Food and Commercial Workers Union, Local 1657, AFL-CIO, or any other labor organization by discharging employees because of their protected, concerted activities, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

(b) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Cassandra Carmichael full reinstatement to her former position, or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of Respondent's unlawful discharge of her on August 28, 1991, in the manner described in the remedy section of this decision.

(b) Remove from its personnel records or other files any reference to its discrimination against Cassandra Carmichael, and notify her in writing that such action has been taken and that evidence of her unlawful discharge will not be used as a basis for future personnel actions against her.

(c) Preserve and, upon request, make available to the Board or its agents for copying all payroll records, social security payment records, timecards, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its office and place of business in Birmingham, Alabama, copies of the attached notice marked "Appen-

dix."²² Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

²² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in United Food and Commercial Workers Union, Local 1657, AFL-CIO, or any other labor organization, by discharging employees because of their protected, concerted activities, or by otherwise discriminating against them.

WE WILL NOT in any other like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer Cassandar Carmichael full reinstatement to her former position, and make her whole, with interest, for any loss she may have suffered because of our unlawful discharge of her.

WE WILL remove from our records all references to our unlawful discharge of Cassandra Carmichael, and notify her in writing that we have done so and that evidence of her discharge will not be used as a basis for future personnel actions against her.

FORESTWOOD FARMS, INC.

²⁰ Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

²¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.